

# Case No. VBH-0002

November 2, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Don W. Beckwith

Date of Filing: February 2, 1998

Case Number: VBH-0002

This Initial Agency Decision concerns a whistleblower complaint filed by Don W. Beckwith (the Complainant) against his former employer, Westinghouse Savannah River Company (WSRC), under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. At all times relevant to this proceeding, WSRC was the management and operating contractor at the DOE's Savannah River Site in Aiken, South Carolina. The Complainant alleges that in December 1997, he disclosed to WSRC that a WSRC management official had engaged in improper conduct. According to the Complainant, WSRC terminated him in January 1998 as a consequence of his disclosure. As discussed below, I have determined that the Complainant is entitled to relief because WSRC has not sustained its evidentiary burden in this case.

## I. Background

### A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. (1) The regulations provide, in pertinent part, that

a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a) (1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an OHA investigator, an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

## **B. Procedural History**

On February 2, 1998, the Complainant filed a Whistleblower Complaint against WSRC pursuant to 10 C.F.R. Part 708. On April 16, 1999, the Office of Inspections of the DOE's Office of Inspector General transferred a number of pending complaints, including the subject complaint, to OHA. On April 26, 1999, the OHA Director appointed an investigator to examine the issues raised in the Complainant's Part 708 Complaint. The investigator promptly conducted an investigation, and issued a Report of Investigation on June 7, 1999. On that same day, the OHA Director appointed me the hearing officer in this case.

On August 24, 1999, I convened a hearing on the Complainant's Part 708 Complaint in Aiken, South Carolina. I received the hearing transcript on September 16, 1999 at which time I closed the record in the case.

## **II. Legal Standards Governing This Case**

### **A. The Complainant's Burden**

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). See [Ronald Sorri](#), 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

In the case at hand, WSRC stipulated at both the investigatory and hearing stages of this proceeding that (1) the Complainant had made a protected disclosure as defined in 10 C.F.R. § 708.5, and (2) the Complainant's protected disclosure can be considered a contributing factor to WSRC's decision to terminate the Complainant because of the temporal proximity that existed between the protected disclosure and the Complainant's termination. In view of WSRC's stipulations, the Complainant is deemed to have met his regulatory burden in this case, thereby shifting the burden to WSRC.

### **B. The Contractor's Burden**

The regulations require WSRC to prove by "clear and convincing" evidence that the company would have terminated the Complainant even if he had not disclosed information about alleged misconduct by a WSRC management official. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See *Hopkins*, 737 F. Supp. at 1204 n.3. In evaluating whether WSRC has met its burden, I will consider the strength of WSRC's evidence in support of its decision to terminate the Complainant; the existence and strength of any motive to retaliate on the part of the officials who were involved in the decision to terminate the Complainant's employ from WSRC; and any evidence that WSRC takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

## **III. Analysis**

It is WSRC's position that even had the Complainant not made the protected disclosure at issue in this case, it would have nonetheless terminated him for dishonest acts, including his violation of WSRC's disability policy. WSRC maintains that it made the decision to terminate the Complainant because the Complainant was seen at a construction site working while drawing 100% disability pay from WSRC, a

fact that led WSRC to conclude that the Complainant could have been working at the Savannah River Site. Transcript of Hearing (Tr.) at 19-21.

WSRC also argues that under applicable state law no liability can be found against the company for terminating the Complainant. *Id.* at 20. WSRC asserts that since the State of South Carolina is an employment-at-will state and the Complainant had no contract with WSRC, WSRC had the right to terminate the Complainant's employment for any reason, as long as it was not a discriminatory reason. *Id.* According to WSRC, its argument is supported by a recent South Carolina Supreme Court decision, *Prescott v. Farmers Telephone Cooperative Inc.*, 516 S.E.2d 923 (S.C. 1999)

Before addressing WSRC's legal argument and evaluating the evidence it has tendered, I will first set forth the facts in this case, including the substance of the protected disclosure and the events leading up to the Complainant's termination.

## **A. Factual Overview**

WSRC or its predecessor employed the Complainant at the DOE's Savannah River Site from 1988 until 1998. Tr. at 277. During all or a part of his tenure at WSRC, the Complainant also owned and operated a residential contractor business. Ex. 17.

In 1994, the Complainant sustained a job-related back injury while working as a mechanic at WSRC's Separations Maintenance Department. *Id.* To accommodate the Complainant's back injury and for safety reasons, WSRC assigned the Complainant to WSRC's Training Department. *Id.*

In the summer of 1995, the Complainant alleges that a WSRC manager offered him a transfer to WSRC's Tritium Maintenance Organization as a shift maintenance mechanic, a position that provided the Complainant with greater earning potential than he had in WSRC's Training Department. *Id.* The Complainant alleges that the offer also included a subsequent promotion to the position of maintenance planner. *Id.* In exchange for these job enhancements, the Complainant claims the WSRC manager asked the Complainant to assist with a construction project at the WSRC manager's home. *Id.* The Complainant reports that he did indeed assist in the construction project by providing free labor, arranging for his subcontractors to install the roof, vinyl, and sheetrock on the project, and allowing the WSRC manager to use his contractor's discounts. *Id.* The Complainant also alleges that the WSRC manager provided paid leave to his third-line supervisor and other WSRC personnel in exchange for their assistance on the construction project. *Id.*

According to the Complainant, the WSRC manager arranged for his transfer to a maintenance mechanic's position in WSRC's Tritium Maintenance Organization in August 1996. *Id.* Due to impending layoffs at WSRC at the time, claims the Complainant, the maintenance planner positions were frozen. *Id.* The Complainant contends that the WSRC manager continued to ask him for favors, nevertheless, always assuring the Complainant he was working on the maintenance planner position for him. *Id.*

In the summer of 1997, some maintenance planner positions became available, and the Complainant was selected to interview for one of these positions. *Id.* According to the Complainant, he was absent from work due to recurring back problems and he missed his scheduled interview. (2) *Id.* The Complainant contends he discussed the matter with the WSRC manager who allegedly assured him he would be interviewed for the maintenance planner position at a later date. *Id.* When the Complainant returned to work in August 1997, he discovered that the maintenance planner positions were already filled. *Id.*

Shortly thereafter, the Complainant approached WSRC's Human Resources Representative (HR Representative) and complained generally about misconduct on the part of a WSRC manager in the Tritium Maintenance Organization. *Id.* To substantiate his allegations, the Complainant provided the HR Representative with a redacted copy of a hand-written note from the WSRC manager to the Complainant. *Id.* The Complainant had removed the WSRC manager's signature from the note prior to supplying it to

the HR Representative and did not otherwise reveal the WSRC manager's name at this point. Id.

On August 20, 1997, WSRC placed the Complainant on Short-Term Disability with full pay as he awaited back surgery. Ex. 36; Tr. at 308. The Complainant underwent back surgery in September 1997, and returned to work in early December 1997. Id.; Ex. 2h.

Sometime around December 12, 1997, the Complainant met with his third-line supervisor and a medical doctor from WSRC (WSRC Medical Doctor). According to the Complainant's testimony, the WSRC Medical Doctor told him at the meeting that he would never perform the duties of maintenance mechanic at WSRC again because of medical restrictions affecting his ability to do his job. Tr. at 284. The Complainant testified he was told he could either find another place of employment or apply for Total and Permanent Disability. Id. The Complainant signed the forms initiating the request for Total and Permanent Disability on December 22, 1997. Ex. 2c. (3) The Complainant claims that before he left the WSRC work-site in December 1997, he furnished to the HR Representative the name of the WSRC manager against whom he had made allegations of improper conduct (the protected disclosure) and the complete copy of the note bearing the WSRC manager's signature that purportedly supported those allegations. Id; Tr. at 334-35.

In January 1998, two of the Complainant's supervisors reported that they saw the Complainant doing physical labor at a house located 50 miles from the Savannah River Site. Ex. 1c, 1d, 1e, 34, 38; Tr. at 44-53, 119. As the result of the eyewitness accounts of the two supervisors, WSRC convened a constructive discipline meeting on January 19, 1998, to discuss whether the Complainant had committed disability fraud. Ex. 1a, 24b. After the meeting, the WSRC Disciplinary Committee (4) recommended that the Complainant be terminated. Ex. 24, 24b. A review committee consisting of the Complainant's first-, second-, third- and fourth-line supervisors, and the HR Representative, however, recommended that the Complainant be confronted with the information and allowed to respond to the allegations. Ex. 1a. On January 20, 1998, WSRC summoned the Complainant to a meeting to provide a response to the allegations that he had been seen performing physical contract work related to his private business while on short-term disability. Ex. 1b. The review committee refused to entertain statements from persons who, the Complainant alleges, would have contradicted the accounts of the two supervisors who allegedly saw the Complainant doing physical labor while on disability. The two supervisors who provided the eyewitness accounts also served as review committee members. Id. at 307. Sometime after the January 20, 1998 meeting, the first-, second-, third- and fourth-line supervisors (but not the HR Representative) memorialized their collective recollection of the subject meeting in an unsworn statement in which they relate that the Complainant admitted in the meeting that he had been on the roof of the house in question but had not performed any work. Id. According to the Complainant, however, he never "got on the roof to complete any roofing work or to supervise the subcontractor." Ex.19; Tr. at 301.

On January 22, 1998, another meeting occurred after which WSRC's President terminated the Complainant effective January 23, 1998. Ex. 17, 24; Tr. at 103.

## **B. WSRC's Testimonial and Documentary Evidence**

To support its contention that WSRC would have terminated the Complainant absent his protected disclosure, the company presented the testimony of the following five witnesses at the hearing: the lead investigator for WSRC's Office of General Counsel (WSRC Investigator); the Complainant's first- and second-line supervisors; a recordkeeper from WSRC's Human Resources Department (HR Recordkeeper); and a former Policy Representative from WSRC's Human Resources Department (WSRC Policy Representative). In addition, WSRC submitted numerous color photographs of the house where the Complainant was allegedly seen working in January 1998, the streets immediately adjacent to the house in question and sketches of street grids in the area around the subject house. See Ex. 42, 43a, 43b, 43c, 43d, 43e and 43f.

### **1. The Complainant's Activities on January 12 and 16, 1998**

The Complainant's first-line supervisor testified that he first observed the Complainant on the roof of the house in question on January 12, 1998. Tr. at 50. On that day, according to the first-line supervisor, the Complainant was overseeing a roofing crew. Id. The first-line supervisor also attested that at 1:00 p.m. on January 16, 1998, he saw the Complainant through binoculars at the subject house climbing a ladder, lifting things to a crew that was roofing the outbuilding, and sawing some material. Id. at 53, 86. When asked what the restrictions are in WSRC's short-term disability program as far as what the Complainant could and could not do, the first-line supervisor expressed his view that the Complainant should not have been working while collecting disability. Id. at 72. When pressed further about whether the first-line supervisor knew whether his view was substantiated by WSRC's policy, he reluctantly admitted that he did not know.

The second-line supervisor testified that he saw the Complainant on January 16, 1998, cutting siding with a table saw, transporting the siding to the workmen, jumping and throwing the siding to the workmen on the roof, picking up a wooden straight ladder and climbing on the roof. Id. at 119-120, 176. The second-line supervisor opined that what he saw the Complainant doing on January 16, 1998, was incompatible with his disability status because the Complainant had previously represented that he was unable to lift a five- to six-ounce package. Id.

The homeowner of the house in question (Homeowner) was to have testified as the Complainant's witness at the hearing. On the day of the hearing, the Complainant revealed that the homeowner refused to become involved in the matter. Prior to the hearing, the WSRC Investigator obtained an unsworn statement from the Homeowner which the company submitted at the hearing over the objections of the Complainant's attorney. In the unsworn statement, the homeowner states while he never observed the Complainant doing any work or heavy lifting, he recalls that the Complainant climbed up a ladder to the rooftop during the roofing work. Ex. 44.

In rebuttal, the Complainant presented three witnesses, the roofing subcontractors who were working at the subject house where the Complainant was allegedly seen on January 12 and 16, 1998. Tr. at 245-276. All three testified that they never saw the Complainant on the roof of the subject house on the dates in question, never saw the Complainant cut any plywood, and never saw the Complainant do any other kind of labor on the house. Id. The Roofing Crew Leader on the project was emphatic that the Complainant never did any physical labor on the job. Id. at 248, 257. What the Complainant did do, according to the Roofing Crew Leader, was to go to the hardware store and get whatever supplies the crew needed. Id. The Roofing Crew Leader testified that in addition to the two other members of his crew who testified at the hearing, he had two other laborers on the job whose function it was to tote shingles and plywood. Id. at 249. The Roofing Crew Leader related that it was he who cut the plywood on the job site, another laborer who pushed the plywood up the ladder, and a third crew member who took the plywood from the ladder and threw it in place. Id. at 258. The Roofing Crew Leader also advised that there were no wooden ladders at the house in question, only aluminum ones. Id. at 259.

The Complainant also testified about his activities on the two days in question. He and the roofing crew met the homeowner of the house in question on January 12, 1998, between 8:30 and 8:45 a.m. Id. at 292. He watched the crew work for awhile, left to purchase coffee to counteract drowsiness from medication, returned to the house around 11:15 or 11:30 a.m. and "hung around" until lunchtime. Id. He took the crew to lunch, returned to the house for 15 or 20 minutes and then went home for the day. Id. at 294. The Complainant asserts that he never was on the roof on January 12, 1998. Id.

As for January 16, 1998, the Complainant states he arrived at the house around 12:30 p.m. Id. He then went to the store to buy some continuous ridge band around 1:00 p.m. and returned to the home around 3:30 p.m. with the material. Id. The Complainant states his crew unloaded the continuous ridge band from the truck, installed it, and finished the job around 4:30 p.m. The Complainant asserts that he never went on the roof on the 16th of January, never climbed up and down a ladder that day, never cut any material that day, and never did any physical labor that day. Id. at 297-99. The Complainant did admit that he went up

on the roof of the subject house on Saturday, January 17, 1998, to view an area about which the homeowner had complained.(5)

### **Evaluation of Evidence and Credibility of Witnesses**

The conflicting testimony in the record leads me to conclude that some of the witnesses were not completely candid in their testimony, their recollection of events were faulty, or their eyewitness accounts were inaccurate. After observing the demeanor of the witnesses at the hearing and considering the other evidence submitted, I am unable to determine whose version of events is the accurate one. It was simply not evident to me at the hearing that any of the witnesses were being untruthful. While I have doubts about all the details of the first- and second-line supervisors testimony (i.e. their claim they saw the Complainant cut siding when there is evidence that there was no siding work being done at the home on the dates in question; their testimony that they saw the Complainant move a wooden ladder when there was testimony only aluminum ladders were being used by the roofing crew; their claim they saw the Complainant working at 1:00 p.m. on January 16, 1998 when the Complainant claims he was en route to purchase some continuous ridge band at that time), those doubts are not so significant that I would discredit their testimony in its entirety.

I do have substantial doubts, however, about the objectivity of the first- and second-line supervisors, both of whom participated in the decision to terminate the Complainant and both of whose eyewitness accounts formed the basis for WSRC's termination decision. The Complainant's first- and second-line supervisors both acknowledged they knew that the Complainant's third-line supervisor (i.e. their boss) had assisted in the construction project that was the subject of the Complainant's protected disclosure. Tr. at 65, 139. In addition, the second-line supervisor acknowledged at the hearing that his immediate supervisor, the Complainant's third-line supervisor, typed the personal statement that set forth the details surrounding the second-line supervisor's viewing of the Complainant on the roof. Id. at 186. Curiously, there was no testimony proffered that the second-line supervisor could not type. Moreover, the second-line supervisor admitted he knew that the Complainant had provided documentation to the HR Representative that supported his protected disclosure, that he is still a friend of the WSRC manager about whom the protected disclosure had been made, and that the WSRC manager could influence the second-line supervisor's ability to remain employed at WSRC. Id. at 136.

I also considered that the Complainant provided a source of income to the roofing crew members when he hired them as subcontractors on various projects. Moreover, I noted that the Complainant typed the roofing crew members' written statement describing the events that transpired on January 12 and 16, 1998. Id. at 252.

It is indeed unfortunate that the Homeowner did not testify at the hearing, a person who presumably has no allegiance to either WSRC or the Complainant. Since I believe the Homeowner's testimony was potentially crucial to resolving one of the chief factual disputes in this case, I am unwilling to accord much weight to the Homeowners' unsworn statement that WSRC tendered in this case. As the Complainant's attorney noted, the inability to cross-examine the Homeowner in a situation such as this is highly prejudicial. I will also accord no weight to the WSRC Investigator's notes of a telephone conversation he had with the Homeowner because (1) the information in the notes is at divergence with that in the unsworn statement, and (2) there was no opportunity to cross-examine the Homeowner about the accuracy of those notes. Since the burden in this case rests with WSRC, it was the company's responsibility to produce witnesses, such as the Homeowner, to prove its case.(6)

The evidence in the record is simply not sufficient for me to find that the Complainant was on the roof and/or doing physical labor at the house in question on January 12 and 16, 1998. I find therefore that WSRC has not clearly and convincingly proven that it terminated the Complainant because he was on the roof of the house in question and/or engaged in physical labor at the subject house at the time he was drawing disability pay.

## **2. The Complainant's Purported Violation of WSRC's Short-Term Disability Policy**

The WSRC Policy Representative testified that WSRC management convened the January 19, 1998 Constructive Discipline Meeting “because of a violation of the disability policy.” *Id.* at 213. She related that the WSRC Disciplinary Committee, of which she was a member, recommended that the Complainant be terminated “due to the violation of our disability policy and fraudulent with [sic] working while being paid full salary to be out on disability.” *Tr.* at 217.

According to the WSRC Policy Representative's testimony, from 1994 through 1998 she implemented all WSRC's Human Resource policies, made sure WSRC was consistent site-wide in its recommendations regarding disciplinary actions and termination, and served as a representative in constructive discipline cases. *Tr.* at 210. At the hearing, the WSRC Policy Representative stated that WSRC's “disability policy requires an employee to be at home, be available at any point in time for management or medical to get in touch with him. Our disability policy does not allow any other type of work.” *Id.* at 221. When queried if Exhibit 23a, the exhibit tendered by WSRC in the record of this case, constituted WSRC's Disability Policy, the WSRC Policy Representative responded negatively. *Id.* at 232. She explained that Exhibit 23a, a part of WSRC's Employee Benefits Handbook, is merely a two- page summary of the company's 20- page Short-Term Disability Policy. *Id.* On cross-examination, the WSRC Policy Representative revealed that WSRC does not provide the disability policy to its employees; it is the employee's responsibility to obtain copies of whatever policy they need to have. *Id.* at 223.

I am unwilling to accord substantial weight to the WSRC Policy Representative's recollection of the terms of WSRC's Short-Term Disability Policy for several reasons. First, she has not had day-to-day responsibility for implementing WSRC's Human Resource policies for more than 18 months. Second, there was no indication in her testimony that she had recently reviewed WSRC's Short- Term Disability Policy in preparation for the hearing. Third, I found it hard to believe her testimony that WSRC's Short-Term Disability Policy required its employees to be at home and available at all times for the company to contact them. Under this scenario, an employee would be prevented from going to the doctor's office, or driving to the pharmacy to obtain medication or the grocery store to purchase food. All these concerns lead me to conclude that WSRC should have tendered its 20-page Short-Term Disability Policy to support its position that the Complainant's actions, whatever they were, violated the terms of that policy.

The only other evidence in the record regarding WSRC's Short-Term Disability Policy and its application to the Complainant's situation is the uncorroborated personal opinions espoused by the first- and second-line supervisors. While I am convinced that both line supervisors earnestly believed that the Complainant was defrauding the disability system, I must decide this issue on evidence before me, not the witnesses' viewpoints or moral convictions.

In the end, I find that it was uniquely within WSRC's power to produce the Short-Term Disability Policy that was in effect during the period in question in this case. Its failure to do so prevents me from finding that the Complainant's activities on the days in question, whatever they were, rise to the level of disability fraud or dishonesty, and constituted a non-retaliatory reason for terminating him.(7) I must therefore find that WSRC has not shown by clear and convincing evidence that it terminated the Complainant for violating the company's disability policy.

## **3. The Complainant's Alleged Dishonesty**

The WSRC Policy Representative also asserted at the hearing that WSRC terminated the Complainant for lying to his managers during the January 20, 1998 meeting. *Tr.* at 218, 232-33. It is clear from the record, however, that the Complainant's purported lying did not form the sole basis for his termination. In fact, the record reveals the WSRC Disciplinary Committee recommended that the Complainant be terminated on January 19, 1998, a day before the Complainant purportedly lied. I view the January 20, 1998 meeting as a mere formality since two of the managerial participants at that meeting were the two eyewitnesses in this case, and WSRC refused to allow the Complainant to present corroborating evidence to support his side of

the story. In addition, the documentary evidence submitted by WSRC indicates that the Complainant's purported lying was inextricably intertwined with his alleged disability violation, on which I have already concluded that WSRC has failed to prove it justifiably relied in terminating the Complainant. The record of a Disciplinary Meeting held on January 22, 1998, reveals that WSRC terminated the Complainant for Dishonest Acts with the notation "fraud/disability violation." Ex. 24a. Handwritten notes on Exhibit 24a state, in relevant part, as follows: [The Complainant] was dishonest in discussing and making his statements concerning working on another job during work hours while out on disability." Ex. 24a.

As noted earlier in this Decision the two line supervisors upon whose eyewitness testimony WSRC's entire case hinges are not necessarily unbiased observers. The Complainant's second-line supervisor is a friend of the WSRC manager who was the subject of the protected disclosure and reluctantly admitted at the hearing that the WSRC manager could influence his continued employment at WSRC. The first-line supervisor also revealed the WSRC manager had been in his supervisory chain during a portion of his tenure at WSRC. In addition, the Complainant testified that in the summer of 1997, he reported his first-line supervisor for violating some safety procedures at the Savannah River Site, yet another reason to question the purity of the supervisor's motives.(8)

Moreover, WSRC failed to proffer the testimony of other more objective witnesses who might have provided relevant, probative evidence regarding the Complainant's alleged lying. (9) It might have been helpful, for example, if the Complainant's fourth-line supervisor had testified since he is the one who conducted the January 20, 1998 meeting. In addition, the HR Representative, the person to whom the Complainant made the protected disclosure and a participant at both the January 19 and 20 meetings, might have provided valuable information on a number of issues. Specifically, it is unclear why the HR Representative did not sign the document in which the Complainant's four-line managers memorialized their collective recollection of the January 20, 1998 meeting. Ex. 1b. Moreover, the HR Representative might have provided insight into the existence or absence of retaliatory animus on WSRC's part, specifically whether the Complainant's whistleblower complaint was alluded to during any of the meetings during which the Complainant's termination was discussed.(10)

Based on the foregoing considerations, I find that WSRC has not shown by clear and convincing evidence that it terminated the Complainant for lying during the January 20, 1998 meeting.

#### **4. WSRC's Treatment of Similarly Situated Persons**

At the hearing, the HR Recordkeeper testified that she tracks all constructive discipline meetings and grievances for WSRC. Tr. at 199. She attested that she reviewed all constructive discipline hearings at WSRC since April 1, 1994 and determined that there were 20 cases involving disciplinary action of some sort under the category, "Dishonest Acts." Of the 20 cases, three involved disability violations, according to the HR Recordkeeper. Id. at 203. Under questioning, the HR Recordkeeper revealed that one of the three cases involved the Complainant. Id. The second of the three cases involved a woman who was playing softball while on disability. Id. WSRC gave the woman a "corrective contact" which, according to the HR Recordkeeper, is the least severe form of disciplinary action on a continuum where the most severe form of punishment is termination. Id. at 203-4. The third of the three cases involved a man "playing horseshoes in a bar. . ." Id. at 204. WSRC terminated that man. Id. The HR Recordkeeper was unable to explain why WSRC accorded different treatment to one of the three individuals who received some sort of disciplinary action based on the unspecified disability violations. Id. at 207. The HR Recordkeeper opined that the WSRC Policy Representative was better suited to respond to this query.

The WSRC Policy Representative, however, was unable to explain why WSRC had handled one of the three disability violation cases differently. Id. at 224-25, 234. She knew few details relating to the other two cases, either, such as whether either of the other two WSRC employees had filed whistleblower complaints. Id. The WSRC Policy Representative further related that either the HR Recordkeeper or the person who took her place as the WSRC Policy Representative could have reviewed the records relating to the other two cases and readily ascertained from those records why WSRC had taken different disciplinary

actions against the two employees involved. Id. at 234-35. The WSRC Policy Representative concluded her testimony by asserting that WSRC makes individual decisions based on individual employees. Id. at 235.

Based on the record before me, WSRC has not proven that it consistently implemented its policy of terminating employees for violating its disability policy. Cf. [Charles Barry DeLoach](#), 26 DOE ¶ 87,509 (1997) (the contractor showed that it consistently implemented its policy of terminating employees where there was conclusive evidence that the employees intended to steal government property).(11) WSRC's failure to explain the specific circumstances surrounding its treatment of two other employees similarly situated to the Complainant prevents me from finding that WSRC terminated the Complainant because its policy is to terminate employees who are found to have violated the terms of WSRC's Short-Term Disability Policy.

## **5. Summary**

The unresolved conflicting testimony in this case makes it impossible to know with any confidence what the Complainant did or did not do on January 12 and 16, 1998. Nevertheless, it is clear from the record that WSRC has not presented clear and convincing evidence that it would have terminated the Complainant absent his protected disclosure. WSRC submits it terminated the Complainant for dishonest acts, including his violation of WSRC's short-term disability policy. Yet, WSRC failed to provide the most probative evidence of the Complainant's purported violation, the Short-Term Disability Policy itself. WSRC alternatively claims it terminated the Complainant for lying in the January 20, 1998 meeting. Yet, the record reveals that the WSRC Disciplinary Committee recommended that the Complainant be terminated on January 19, 1998. WSRC also claims it terminated the Complainant for working while on disability, a fact that lead it to conclude that the Complainant could have been working at the Savannah River Site. Yet, the evidence submitted by WSRC did not clearly and convincingly prove that the Complainant was either on the roof of the house in question or performing physical labor at the subject house. WSRC also has not provided clear and convincing evidence that it consistently terminates employees who violate the terms of its Short-Term Disability Policy. The limited evidence it presented to support this position, i.e., it terminated a man who was playing horseshoes while on disability but did not terminate a woman who was playing softball while on disability, raises more questions than it answers.

What is noticeably absent in this case is testimonial evidence from unbiased witnesses who might have provided relevant, probative information on the issue of the Complainant's activities on the days in question. It is possible, for example, that testimony from the Homeowner might have tipped the scales in WSRC's favor had the company elected to secure the Homeowner's presence at the hearing. In addition, testimony from the Complainant's fourth-line supervisor and the HR Representative might have provided insight into the January 20, 1998 meeting where the Complainant allegedly lied.(12)

## **C. WSRC's Legal Arguments**

As a final matter, I reject WSRC's contention that no liability can be found against the company because the State of South Carolina is an employment-at-will state. WSRC agreed in its contract with the DOE to abide by the Part 708 regulations which are national in scope, further important DOE policy interests, and are intended to apply to all DOE management and operating contractors. Moreover, WSRC has cited no cases that suggest that the law in the State of South Carolina prevents the company from complying with this regulatory mandate.

The case cited by WSRC, *Prescott v. Farmers Telephone Cooperative Inc.* (Prescott), 516 S.E.2d 923 (S.C. 1999), is not controlling. Prescott involved a wrongful discharge action brought by an employee against his former employer alleging breach of an employment agreement, breach of the implied duty of good faith and fair dealing, defamation, intentional interference with an economic relationship, promissory estoppel, and specific performance. While holding that vague assurances of job security by the employer

in Prescott did not alter the employee's employment-at-will status, the Court recognized that the employment-at-will doctrine can be contractually altered by the employer and employee. In this case, WSRC contractually agreed with the DOE not to discharge or otherwise discriminate against any employee because that employee has made a protected disclosure as defined in 10 C.F.R. Part 708. It stands to reason that WSRC's employees are third-party beneficiaries of the contract between the DOE and WSRC, and that the WSRC employees' employment- at-will status is altered to the extent dictated by the Part 708 regulations. (13)

## **D. Conclusion**

As set forth above, I am compelled to find for the Complainant because WSRC has not sustained its evidentiary burden in this case. Given the paucity of information in the record regarding the appropriate remedy in this case, and in fairness to both parties, I will permit the parties to submit information on this issue before I render a determination on it.

## **IV. Remedy**

The Part 708 regulations provide that if the initial agency decision determines that an act of retaliation has occurred, it may order: reinstatement, transfer preference; back pay; reimbursement of reasonable costs and expenses, including attorney and expert-witness fees; and such other remedies as are necessary to abate the violation and provide the employee with relief. 10 C.F.R. § 708.36. At the hearing, the Complainant stated that he desired to be reinstated if he prevailed in this proceeding. Tr. at 330. Since neither party presented any information on the issue of remedy, I find it appropriate to allow the parties to submit briefs before determining the appropriate remedy in this case.

I am especially interested in the parties' views with regard to reinstatement since the current record suggests that the Complainant was unable to perform his job of maintenance mechanic at the time WSRC terminated him. I direct the Complainant to submit a detailed statement setting forth the precise remedy he is seeking, including a summary of his expenses and attorney fees within 15 days of his receipt of this Initial Agency Decision. WSRC will then have 15 days from its receipt of the Complainant's statement to respond to the Complainant's remedy request. The parties are also free, of course, to seek mediation regarding the issue of remedy. If they chose this course of action, I will hold the remedial phase of this case in abeyance for 30 days pending mediation on the issue.

It Is Therefore Ordered That:

- (1) The Request for Relief filed by Don W. Beckwith under 10 C.F.R. Part 708 is hereby granted as set forth in paragraph (2) below.
- (2) Within 15 days of receipt of this Initial Agency Decision, the Complainant shall submit to the Office of Hearings and Appeals and Westinghouse Savannah River Company a detailed statement setting forth the precise remedy he is seeking, including a summary of his expenses and attorney fees. Westinghouse Savannah River Company shall have 15 days from its receipt of the Complainant's submission to file a responsive document. Should the parties elect to seek mediation to resolve the remedial phase of this case, they shall notify me immediately and I will hold this proceeding in abeyance for a period of 30 days.
- (3) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the complaint unless, within 15 days of the issuance of a Supplemental Order with regard to remedy in this case, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date: November 2, 1999

(1) On March 15, 1999, the DOE published an Interim Final Rule revising the regulations governing the Contractor Employee Protection Program. See 64 Fed. Reg. 12862 (March 15, 1999) (amending 10 C.F.R. Part 708, effective April 14, 1999). Section of 708.8 of the revised regulations provides that the new procedures “apply prospectively in any complaint proceeding pending on the effective date of this part.” Thus, the Interim Final Rule is applicable to the instant case. In this regard, under the revised Part 708 regulations, the DOE’s Office of Hearings and Appeals (OHA) assumed investigatory jurisdiction over all pending and future complaints, including the one under consideration.

(2) The Complainant’s medical records reflect that he has a long history of chronic back pain and suffers from degenerative arthritis of the spine. Ex. 2b, 2d, 2f, 2g, and 2h.

(3) The individual continued to receive Short-Term Disability Benefits during the time he was awaiting a decision on his Total and Permanent Disability request.

(4) The members of that committee were the Complainant’s first-, second-, third-, and fourth-line managers, the WSRC Medical Doctor, the HR Representative, a WSRC Policy Representative, an EEO representative, and an HR Consultant. Ex. 1a.

(5) At the hearing, the Complainant had difficulty concisely articulating what he had communicated to others about his activities on January 12 and 16, 1998. He testified that after the January 20, 1998 meeting, he told the HR Representative, “I wasn’t on the roof . . . If I was up there, I was only talking.” Tr. at 308. Under questioning, the Complainant claimed, in essence, that he was only using a hypothetical and did not intend to communicate in any way that he was on the roof at anytime. Id. I found it quite unusual that the Complainant would use hypotheticals in response to direct questions calling for a yes or no response. It is understandable how WSRC might have construed a response such as the “hypothetical” described above as a contradiction of the Complainant’s previous denials of being on the roof.

(6) I recognize, of course, that WSRC probably relied on the Complainant’s representation during the pre-hearing conference that he would produce the Homeowner as a witness. Nevertheless, WSRC knew that it had the burden of proof in this case. WSRC knew from the Report of Investigation that the OHA investigator had identified the Homeowner as a person whose testimony at the hearing might be useful in resolving disputed issues of fact. In my opinion, WSRC could have, and probably should have, identified the Homeowner as its witness and taken steps to secure the Homeowner’s testimony by subpoena.

(7) WSRC had ample opportunity before, during, and after the hearing to submit any evidence it deemed relevant to the issues at hand, including WSRC’s 20-page Short-Term Disability Policy. I note that WSRC chose not to supplement the record with post-hearing briefs or evidence when given that opportunity. Tr. at 339.

(8) The Complainant’s safety allegation against his first-line supervisor was apparently never presented by the Complainant as a protected disclosure under Part 708.

(9) It is understandable why WSRC did not present the testimony of the Complainant’s third-line supervisor as he was accused by the Complainant of working on the home improvement project for the WSRC manager against whom the Complainant made the protected disclosure.

(10) There are differing recollections of whether the Complainant’s Part 708 Complaint was discussed at any of the meetings leading up to the Complainant’s termination. The WSRC Policy Representative testified that there was no discussion about the Complainant’s allegations against the WSRC manager at

the meetings she attended. The first-line supervisor did not recall if there was any discussion about the Complainant's Whistleblower Complaint in the meeting with WSRC's President. Tr. at 103. The second-line supervisor testified that no one mentioned the allegations against the WSRC manager in any of the meetings discussing the Complainant's termination. Id. at 132. Upon further examination, however, the second-line supervisor revealed that while he did not recall the WSRC President discussing the Complainant's Part 708 Complaint, he did recall another high-level WSRC Executive alluding to a complaint filed against the WSRC manager. Id. at 197. The Complainant testified that at one of the meetings, he looked at his third-line supervisor and said, "This has got to do with [the WSRC manager] and that's it. I know it." Id. at 306. According to the Complainant, his first-, second-, and third-line supervisors said nothing in response. Id.

(11)WSRC also provided no evidence showing it routinely terminates its employees for lying.

(12)This assumes that WSRC had introduced into evidence its Short-Term Disability Policy and that the policy prevented the Complainant from being away from his home as recounted by the WSRC Policy Representative.

(13)It is instructive that the Supreme Court of the State of South Carolina held in a case involving a claim brought under the State Whistleblower Act that the trial court correctly refused to charge the jury on the employment-at-will doctrine, finding that the employment-at-will of the whistleblower was irrelevant under the version of the State Whistleblower Act in force at the time of the whistleblower's termination. *Baber v. Greenville County*, 488 S.E.2d 314 (S.C. 1997)